No. 77-1517

In the

Supreme Court of the United States

OCTOBER TERM, 1977

JAMES E. GARRISON, President, Board of Education, School District 215; JAMES C. VARNER, Secretary, Board of Education, School District 215; JAMES BURCZYK, Member, Board of Education, School District 215; ROY E. CARRUBBA, SR., Member, Board of Education, School District 215; LARRY T. GIOVINGO, Member, Board of Education, School District 215; WILLIAM D. MORGAN, Member, Board of Education, School District 215; DONALD W. SOBCZAK, Member, Board of Education, School District 215; CHARLES B. WHALEN, Superintendent, School District 215,

Petitioners,

vs.

JULIA GAULT, individually and on behalf of all others similarly situated.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the appellate court erred by simply adhering to this Court's decisions in reversing the grant of a motion to dismiss, a reversal merely enabling a record to be finally made in this case so that the substantive claims can be resolved.

STATEMENT OF THE CASE

Julia Gault, a 65-year-old high school biology teacher, filed suit in April, 1974, challenging the constitutionality of her school board's policy which required her to retire upon reaching age 65.

Prior to any evidence being taken, the district court dismissed Mrs. Gault's suit. It did allow her to submit an "offer of proof," summarizing the testimony which would have been presented had the court allowed a hearing. This offer was filed on the same day on which the court handed down its order dismissing the cause, and included the affidavits of a gerontologist and of Mrs. Gault's school principal.

Mrs. Gault pleaded that she was in good health, able to work, and desirous of working. She alleged that her involuntary termination injured her in a number of enumerated ways, that the school board's policy was arbitrary and irrational in several detailed respects, and that the policy violated her constitutional rights.

Having heard no evidence, the trial court dismissed, simply announcing as *ipse dixit,* without any citation of authority:

> [Age 65] . . . has long been accepted in our society as an age when most people, because of diminishing mental and physical stamina, are no longer able to endure the rigors of full-time employment. This chronological demarcation has generally proved to be reasonable and fair . . . [I]t cannot be said that the defendants' policy . . . has no rational basis or is otherwise arbitrary or discriminatory.
>
> Pet. Br., App. 3a.

The Court of Appeals for the Seventh Circuit reversed. Agreeing with the district court that the rationality

standard applied, the Court was unable to identify any assertion by the defendants of their policy's purpose. Pet. Br., App. 17a. Moreover, since the record—consisting of the complaint, which demonstrated the irrationality of the policy; the defendants' motion to dismiss, which admitted the truth of the complaint; and the offer of proof —set out only facts and data establishing the plaintiff's position, there was nothing to support the trial court's dismissal. As the appellate court, speaking through Judge Swygert, concluded: "Here, there is no record." Pet. Br., App. 18a.

Consequently, the Court of Appeals reversed and remanded so that the merits might be resolved substantively before the trial court. Despite the utter absence of any attempt by the defendants to justify their mandatory retirement policy, the Court of Appeals did not rule for the plaintiff on the merits.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because none of the criteria set out in Rule 19 of this Court are met. Rather, the ruling of the Court of Appeals is in accord with controlling decisions of this Court. Moreover, review by the Court at this juncture would be premature: the case is virtually devoid of any record save the allegations of the complaint, thus affording no effective basis for substantive review of the underlying claims.

The petitioners argue that "[t]he controlling opinion, in determining that the Board of Education has not demonstrated the purpose or justification for its mandatory retirement policy, even if the presumption is to prevent retention of unfit teachers, creates a schism in the law." Pet. Br., 7-8.

Such "schism" is imaginary; in fact, the ruling below readily squares with the decisions of this Court. For the Court has made it very clear that a challenged governmental regulation must be shown to have an articulated purpose. Thus, as the Court said in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973): "The . . . [state] scheme still must be examined to determine whether it rationally furthers some legitimate, articulated purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause . . .". See also, *New Orleans* v. *Dukes,* 427 U.S. 297, 304 (1976); *Weinberger* v. *Weisenfeld,* 420 U.S. 636, 650 (1975).

Particularly apposite in demonstrating this minimum requirement of an identified purpose is *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976), which addressed a mandatory retirement law affecting

state police officers. The *Murgia* Court, like the appellate court here, applied the "rational-basis standard" to assess the legitimacy of the provision. 427 U.S. at 314. It was satisfied that this "relatively relaxed standard," justified upholding the Massachusetts statute, for the state's classification rationally furthered *"the purpose identified by the State*: . . ."[1] Ibid. (Emphasis added).

The straightforward adherence of the appellate court to *Rodriguez* and *Murgia* can hardly form a legitimate basis for arguing that certiorari should be granted. These decisions establish that plaintiffs in equal protection cases are not consigned by the rational basis test to litigating in utter ignorance, entitled to claim they are being deprived as a result of a given law, but not permitted to even know the purpose of that law as they plead their case. Rather, the rational basis test simply and naturally requires at the least an assertion of what the purpose of the challenged policy is. That assertion is of course totally absent here; as the Court of Appeals concluded: "The defendants have not identified the purpose of the requirements in question; their briefs only hint that the purpose may be to remove unfit teachers."[2] Pet. Br., App. 17a.

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[1] At this juncture, the Court, just after the word "State," cited to the *Rodriguez* statement quoted *supra,* aptly demonstrating that *Rodriguez* was no aberration.

[2] Petitioners refer to a "presumption . . . to prevent retention of unfit teachers." Pet. Br., 8. This was a "presumption" hypothesized by Judge Swygert *after* his stated conclusion that the defendants themselves had never offered any justification for their policy.

If petitioners are now—finally—asserting a purpose by relying upon Judge Swygert's hypothesis, they go astray, since the Judge readily rejected his own hypothesis after

Petitioner's related, and equally untenable, argument is that the appellate court erred "by placing the burden on the Board of Education to justify its mandatory retirement policy and by failing to address itself to a reasonable set of circumstances that would justify the policy." Pet. Br., 7. All that the Court of Appeals indeed did was to apply a simple analysis, brigaded with guiding precedent.

The only information before the appellate court was that conveyed by the allegations of the plaintiff's complaint, and in the plaintiff's "offer of proof." The complaint, admitted to be true by the defendants for the purpose of their motion to dismiss, established that Julia Gault was capable of continuing to teach, that she would be injured if she were forced to retire on the basis of age alone, that the mandatory retirement policy was irrational and arbitrary, and that it was therefore unconstitutional.

The "offer of proof" consisted of the affidavits of an expert—a gerontologist, attesting to the irrationality of age-based mandatory retirement; of the plaintiff's school principal, attesting to Mrs. Gault's continuing competence and ability to teach beyond age 65; and Mrs. Gault herself.

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[2] (Continued)
stating it. Pet. Br., App. 17a-18a. Moreover, if they are independently asserting this "presumption", for the first time, in their petition to this Court, they have neither documentation nor a record to support it. Thus, the "presumption" could, given its total lack of any support, well be "a convenient, but false, *post-hoc* rationalization." *Craig* v. *Boren,* 97 S. Ct. 451, 458 n.7. At the very least, a determination as to the validity of this presumption should be left until after a full hearing in the district court.

In brief, the plaintiff had well made out a prima facie case of an irrational policy, thus establishing a constitutional violation.

The defendants never attempted to rebut the plaintiff's case, in any way. If there were any basis for disputing the plaintiff's factual presentation, it clearly was not before the courts below. For the Court of Appeals nonetheless to have affirmed the trial court, it would not only have had to hypothesize facts to fit its conclusion, but also, having conjured those facts, it would have had to then pose them against the actual record and find these imagined facts more persuasive than reality. Such a course was obviously properly rejected. As Judge Swygert said:

> The decision in *Murgia* was based on an evidentiary record showing the state's purpose and how the challenged legislation related to that purpose. Here, there is no record.
>
> Pet. Br., App. 18a.

And Judge Barnes, concurring, echoed that conclusion: "(N)o evidence has been presented at any time, . . . we have no factual basis upon which to judge the issues or to apply the law." Pet. Br., App. 20a.

Under such circumstances, the Court of Appeals' decision was inescapable, and eminently proper. The plaintiff made a showing that the mandatory retirement rule was irrational, the defendants made absolutely no effort to rebut that showing, and the Court of Appeals properly directed a trial of the issues. See *Castaneda* v. *Partida,* 97 S. Ct. 1272 (1977).

It may ultimately develop, after a trial on the merits, that this Court will deem review of the substantive claims

to be warranted. At this juncture, denial of the writ is the proper course, for at this stage of the case, all that is before this Court is a mundane application of unambiguous precedent and simple common sense to deal with a routine procedural matter—disposition of a motion to dismiss.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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